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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 362

VINCENT FRANCIS MCGEE, JR.,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on March 31, 1970.

Opinion Below

The opinion of the Court of Appeals is not officially reported. It is unofficially reported at 2 SSLR 3607 and is set out in the Appendix, *infra*, pp. 1a-18a.[1] The dissenting opinion of Circuit Judge Feinberg is set out at pp. 19a-29a of the Appendix.

[1] Numbers followed by "a" refer to the pages in the Appendix to this Petition.

Jurisdiction

The judgment of the Court of Appeals was entered on March 31, 1970. On May 7, 1970, the Court of Appeals denied petitioner's motion for rehearing or rehearing *in banc*. On June 1, 1970, Mr. Justice Harlan issued an order extending the time within which to file this petition for writ of certiorari up to and including July 6, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether the exhaustion of administrative remedies doctrine should be applied when there is no basis in fact for denying a registrant an exemption for which he has applied, especially when a fundamental procedural error committed by the local board could not have been disclosed by the registrant's appeal through the administrative process.

2. Whether a registrant who meets every qualification for the statutory exemption as a divinity student may be denied a IV-D classification because he does not request that classification from his local board.

3. Whether a registrant can be convicted for failure to report for a physical examination when, if properly classified, he could not have been lawfully ordered to report or, if ordered to report, he could have waived the examination without penalty.

4. Whether a registrant who is unlawfully classified can be convicted for failing to possess a Notice of Classifica-

tion (SSS Form 110) which reflects the unlawful classification.

5. Whether a registrant's conviction for failure to submit certain information to a local board can stand if the judge charges that the jury can find the defendant guilty if he failed to complete a questionnaire, thereby precluding the jury from determining whether he did supply the requested information in some other manner.

6. Whether a conviction for failure to submit certain information to a local board can stand if the registrant substantially complied with the information-giving requirement of the Selective Service Regulations.

7. Whether petitioner's convictions on two minor counts should be allowed to stand in light of the fact that, if petitioner had been properly classified, the prosecution on these counts might not have been brought or, if brought, might have resulted in a different verdict or sentence.

Statutes and Regulations Involved

MILITARY SELECTIVE SERVICE ACT OF 1967, 50 U.S.C. APP.

Section 456(g) Regular or duly ordained ministers of religion . . . and students preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools . . . shall be exempt from training and service (but not from registration) under this title. . . .

Section 456(j) *Conscientious objectors.*—Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form.

Section 462 *Penalties.*—(a) Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said title, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provisions of this title, or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title, or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title, or any person or

persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this title or the rules or regulations made pursuant thereto, or who conspires to commit any one or more of such offenses, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by court martial in any case arising under this title unless such person has been actually inducted for the training and service prescribed under this title or unless he is subject to trial by court martial under laws in force prior to the enactment of this title. Precedence shall be given by courts to the trial of cases arising under this title, and such cases shall be advanced on the docket for immediate hearing, and an appeal from the decision or decree of any United States district court or United States court of appeals shall take precedence over all other cases pending before the court to which the case has been referred.

Selective Service Regulations

32 C.F.R.

§1622.1 . . .

(c) . . . . The local board will receive and consider all information, pertinent to the classification of a registrant, presented to it. The mailing by the local board of a Classification Questionnaire (SSS Form No. 100) to the

latest address furnished by a registrant shall be notice to the registrant that unless information is presented to the local board, within the time specified for the return of the questionnaire, which will justify his deferment or exemption from military service the registrant will be classified in Class I-A.

§1622.10 . . .

In Class I-A shall be placed every registrant who has failed to establish to the satisfaction of the local board, subject to appeal hereinafter provided, that he is eligible for classification in another class.

§1622.25 . . .

(a) In Class II-S shall be placed any registrant who has requested such deferment. . . .

§1622.43 . . .

(a) In Class IV-D shall be placed any registrant . . .

(3) Who is a student preparing for the ministry under the direction of a recognized church or religious organization and who is satisfactorily pursuing a full-time course of instruction in a recognized theological or divinity school. . . .

§1623.1 . . .

(b) The registrant's classification shall be determined solely on the basis of the official forms of the Selective Service System and such other written information as may be contained in his file; provided, that the local board shall proceed with the registrant's classification and classify him whenever (1) he fails to return his Classification Questionnaire (SSS Form No. 100) within the time al-

lowed by §1621.10 of this chapter, or (2) he fails to provide the local board with any other information concerning his status which he is requested or required to furnish. . . .

§1623.2 . . .

Every registrant shall be placed in Class I-A under the provisions of section 1622.10 of this chapter except that when grounds are established to place a registrant in one or more of the classes listed in the following table, the registrant shall be classified in the lowest class for which he is determined to be eligible. . . .

§1623.5 . . .

Every person who has been classified by a local board must have in his personal possession at all times, in addition to his Registration Certificate (SSS Form No. 2), a valid Notice of Classification (SSS Form No. 110) issued to him showing his current classification. . . .

§1628.11 . . .

(b) . . . the local board shall mail an Order to Report for Armed Forces Physical Examination (SSS Form No. 223) to registrants who have been classified in Class I-A, Class I-A-O, and Class I-O. . . .

(c) The local board may also mail an Order to Report for Armed Forces Physical Examination (SSS Form No. 223) to any registrant who is classified in a class other than Class I-A, Class I-A-O, or Class I-O if it determines that his induction may shortly occur. . . .

§1641.2 . . .

(b) If a registrant or any other person concerned fails to claim and exercise any right or privilege within the required time, he shall be deemed to have waived the right or privilege.

Statement of the Case[2]

Petitioner is a Roman Catholic who, at the time he was ordered to report for induction, was a student at the Union Theological Seminary in New York City. He registered with Local Board 15 in Manhattan in August 1961 and informed the board a month later that he was "a student preparing for the ministry at the Cathedral College of St. Joseph's Seminary . . . under the direction of the Roman Catholic Church." After enrolling in the University of Rochester, he was granted a II-S (student) deferment. In February 1966, while still classified II-S, petitioner requested conscientious objector status, stating that it was his "intention to continue on to actual ordained Priesthood." The clerk of his board wrote him on March 23:

> "This will advise that the recent evidence submitted concerning your case has been reviewed by the Local Board. It is the decision of the Board that such evidence does not justify the reopening of your case and reconsideration of your present classification.
>
> However, we wish to advise that your claim as Conscientious Objector will be considered when you no longer qualify for a student classification." App., *infra*, p. 3a.

Petitioner later requested and was granted a further II-S classification in October 1966.

In April 1967, while still classified II-S and enrolled in the University of Rochester, petitioner wrote President

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[2] Except for those facts which are supported by references to the transcript of trial (designated by the letter "T"), the statement of the case is based upon the opinion of the Court of Appeals.

Johnson, enclosing remnants of his torn and burnt draft card. This letter stated that even though he had "already been accepted for graduate study in a program where" he "would probably qualify for theological deferment," he felt it necessary to "sever every link with violence and war" and to refuse to cooperate "with the military-industrial complex which seems to be dictating our international policy." App., *infra*, p. 3a. Petitioner's local board received a copy of this letter, apparently considered reopening his classification and decided against it, and, in any event, did not change his II-S classification and deferment. App., *infra*, p. 3a.

Following graduation from the University of Rochester in June 1967, his board sent him a Current Information Questionnaire (SSS Form 127). Petitioner returned it unanswered and in a covering letter announced that "further correspondence" from the draft board would "simply be returned unopened," consistent with his belief that "cooperation is approval." On September 19, 1967, petitioner was reclassified I-A, notwithstanding his still pending application for conscientious objector status. The Board mailed him a notice of classification and a letter informing him that he had a right to ask for a personal appearance or an appeal within 30 days. Petitioner returned this unopened, writing on the envelope:

> "Returned pursuant to previous declaration and notification." App., *infra*, p. 4a.

Petitioner matriculated in the Union Theological Seminary as a full-time student on September 27, 1967. At no time did he request a IV-D (divinity student) classification from his draft board, but petitioner's letter to the

President in April 1967, an interview with two FBI agents in May 1967, and testimony before a grand jury in November 1967, gave the government notice of his eligibility for a IV-D exemption.

Subsequently, petitioner also returned unopened an order directing him to appear for a physical examination scheduled for October 18, 1967, and did not appear for it. He returned a delinquency notice sent on November 22, 1967. Petitioner did open his induction notice, which was sent on January 11, 1968, and did pass a physical examination at the induction center. However, he refused to submit to induction.

Petitioner was indicted on February 29, 1968. In a four-count indictment, he was charged with refusal to submit to induction (Count One), refusal to report for a physical examination (Count Two), failure to have in his personal possession a valid notice of classification (Count Three), and failure to submit certain information requested (Count Four), all in violation of Title 50, App., U.S.C. §462(a) and various selective service regulations. Petitioner moved to dismiss the indictment on various constitutional and statutory grounds. The motion was denied on June 13, 1968 by Judge Edmund L. Palmieri on the ground that it presented factual matters which had to be resolved at trial. After a jury trial, petitioner was found guilty on all four counts, and on January 16, 1969, was sentenced by Judge Thomas F. Murphy to two years on each count, the sentences to run concurrently.

Petitioner's conviction was affirmed by the Court of Appeals, Circuit Judge Feinberg dissenting, on March 31, 1970. Judge Feinberg stated that petitioner should have been classified I-O and that the exhaustion doctrine should

not have been applied to petitioner's failure to appeal from his I-A classification. He believed that Counts 1 and 2 should have been reversed and a judgment of acquittal directed on the basis of the improper classification and that Counts 3 and 4 should have been reversed for reconsideration. App., *infra*, p. 29a.

Reasons for Granting the Writ

Petitioner maintains that his local board acted unlawfully in classifying him I-A in September 1967, when he should have been classified either IV-D or I-O. On that premise he claims that he cannot be convicted of refusing to submit to induction (Count 1) because his order to report for induction was illegal; that he cannot be convicted of refusing to report for a physical examination (Count 2) because if he had been properly classified, he would not have been called for a physical or, if called, could have waived the examination without penalty; that he cannot be convicted of failing to possess a valid notice of classification (Count 3) because his I-A classification was invalid, and that he cannot be convicted of failure to supply information to his local board (Count 4) because he substantially complied with its request and because any information not supplied was favorable to him.

1. Certiorari should be granted because the decision of the Court below, upholding petitioner's conviction because he failed to exhaust his administrative remedies, is in conflict with the decision of the Fourth Circuit Court of Appeals in *United States* v. *Davis*, 413 F.2d 148 (1969) and the decisions of this Court in *McKart* v. *United States*, 395 U.S. 185 (1969) and *McNeil* v. *United States*, 395 U.S. 463 (1969).

This Court, in *McKart* v. *United States*, 395 U.S. 185 (1969), warned generally that the " . . . use of the exhaustion doctrine in criminal cases can be exceedingly harsh . . . [and] should not be tolerated unless the interests underlying the exhaustion rule clearly outweigh the severe burden imposed upon the registrant if he is denied judicial review." 395 U.S. at 197.

Section 6(j) of the Military Selective Service Act of 1967 (the "Act"), 50 U.S.C. App. §456(j), provides that conscientious objectors shall be exempt from military service. The majority below and the dissenting judge agreed that petitioner presented sufficient information to his local board to warrant his classification as a conscientious objector and that the local board had no "basis in fact" for denying him that status. App., *infra*, pp. 11a and 19a. Therefore, the I-A classification and induction order which followed must have been unlawful, regardless of any failure of petitioner to appeal his I-A classification. Having provided the Selective Service System with sufficient information to establish that he was a conscientious objector, petitioner did all that the statute required of him. The effect of the majority opinion is to use a rule of "comity

and not power," *United States ex rel. Tobias* v. *Laird*, 413 F.2d 936, 939 (4th Cir. 1969)—a rule for which there is no authority in the Act, *McKart* v. *United States*, 395 U.S. 185, 197 n. 14 (1969)—as a means for denying an exemption which is mandated by the Act.

The majority was led to this result by an unnecessarily restrictive reading of *McKart* v. *United States, supra*. As Judge Friendly, writing for the majority, points out, this Court discussed the possible application of the exhaustion rule in other than sole surviving son cases. But it should be noted that the Court said only that use of the exhaustion rule "may"—not "shall"—be appropriate in other cases. 395 U.S. at 200.

Indeed, this Court, in vacating and remanding *McNeil* v. *United States*, 395 U.S. 463 (1969), for further consideration in light of *McKart*, has clearly indicated that the exhaustion rule should not be applied under circumstances similar to those present here. The Court of Appeals in *United States* v. *McNeil*, 401 F.2d 527 (4th Cir. 1968) (Craven, *J.*), had declined to review a claim of improper denial of a ministerial and conscientious objector claim because the registrant had failed to appeal his classification.[4] Subsequent to the remand in *McNeil*, Judge Craven reconsidered the issue presented by *McNeil* and stated:

> "We think *McKart* undermines the rule in this and other circuits that in conscientious objector and ministerial status cases the district court ordinarily need

[4] Counsel has been advised by the clerk of the United States District Court for the Eastern District of Virginia, that, on remand, a judgment of acquittal was entered on January 20, 1970 by Judge Merhige.

> not examine the selective service file to determine whether or not there exists a basis in fact for the I-A classification unless the registrant has appealed to the Administrative Appeal Board." *United States* v. *Davis*, 413 F.2d 148, 151 (4th Cir. 1969).

In short, this Court has said that the exhaustion doctrine should not preclude a district court from considering the denial of any exemption simply because of the failure to pursue an administrative appeal. The Fourth Circuit has adopted that position. The Court below rejected it.

The majority below reviewed the factors which *McKart* says weigh in favor of applying the exhaustion rule and found three of the four factors present in the instant case. *McKart*, however, did not say that the presence of those factors *mandates* application of the exhaustion rule. Nor could it have, for in fact all three factors were present in *McKart*.

The first of those factors, that petitioner might have been "successful in vindicating his rights in the administrative process," App., *infra*, p. 13a, was obviously present in *McKart*. Petitioner there, just as petitioner here, could have appealed the denial of his claimed exemption and been granted it.

The second factor is related to the first, namely "that the agency be given a chance to discover and correct its own errors." App., *infra*, p. 13a. No one would question that this factor was present in the case at bar and in *McKart*.

It should be understood that these first two factors should properly count for little in an individual criminal

case unless relaxation of the exhaustion rule will encourage others to avoid the regular administrative channels and thereby undermine their effectiveness. In other words, justice should demand that a defendant not be prevented by application of the exhaustion rule from asserting a valid defense unless others will thereby be led to follow his example and ignore entirely the available administrative procedures. This is the third factor which Judge Friendly draws from *McKart*, and petitioner respectfully suggests that it is answered by *McKart* itself:

> "We doubt whether many registrants will be foolhardy enough to deny the Selective Service System the opportunity to correct its own errors by taking their chance with a criminal prosecution and a possibility of five years in jail. The very presence of the criminal sanction is sufficient to ensure that the great majority of registrants will exhaust all administrative remedies before deciding whether or not to continue the challenge to their classification. . . . In short, we simply do not think that the exhaustion doctrine contributes to the fairly low number of registrants who decide to subject themselves to criminal prosecution for failure to submit to induction." 395 U.S. at 200.

It simply does not make sense for a registrant seeking a deferment or exemption to bypass his administrative remedies even if he knew that a court would review his claim. His right of review in court would still be limited to whether there was a "basis in fact" for denying his claim, whereas he would only have to convince the Selective Service System that, on the weight of the evidence, he deserves the classification. In short, the assumption

that a holding for petitioner would "multiply the already heavy burden that cases like his are imposing on the courts," App., *infra*, p. 18a, is unsupportable. There in fact have been very few cases like petitioner's in the past (the majority cited only *United States* v. *Palmer*, 223 F.2d 893 (3rd Cir.)), *cert. denied*, 350 U.S. 873 (1955), and it is hardly likely that registrants may be moved to a position of non-cooperation with Selective Service by analyzing whether it would improve their chances in court.

Not only does *McKart* impliedly or directly give little weight to the factors cited by the majority as justifying the application of the exhaustion doctrine in this case, but the fact that the local board committed a fundamental procedural error further militates against application of the exhaustion rule. As Judge Feinberg demonstrated, App., *infra*, pp. 19a-22a, the record is clear that petitioner's local board failed to ever consider his application for conscientious objector status on its merits. That failure is not only a violation of the regulations, 32 C.F.R. 1622.1 (c), but a direct violation of the Act, which requires that a local board "shall . . . hear and determine . . . all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this title . . . " 50 U.S.C. App. §460(b)(3). By failing to consider petitioner's application, the board avoided its most fundamental responsibility under the Act, to gather information so as to properly classify the registrant. What the majority calls "an inadvertent failure," App., *infra*, p. 15a, was in fact so "basically lawless" that a court may intervene without requiring appeal through the administrative system. *Oestereich* v. *Selective Service System Local Board No. 11*, 393 U.S. 233, 237-38 (1968). See also, *Hunt* v. *Local Board No. 197*, 423 F.2d 576 (3rd Cir.

1970); *Barker* v. *Hershey*, 309 F. Supp. 277 (W.D. Wis. 1969); *Walsh* v. *Local Board No. 10*, 305 F. Supp. 1274 (S.D.N.Y. 1969). This is in accordance with the general principle that exhaustion is not required where the administrative agency exceeds its jurisdiction. See generally, Layton and Fine, "The Draft and Exhaustion of Administrative Remedies," 56 *Geo. L.J.* 315, 322-31 (1967); *Wolff* v. *Selective Service Local Board No. 16*, 372 F.2d 817, 825 (2d Cir. 1967).

The majority below avoided this issue by suggesting that the board first considered petitioner's application when it was filed in February 1966. Judge Feinberg correctly points out, App., *infra*, p. 19a, however, that, since petitioner was then entitled to a II-S deferment, it would have been inappropriate to consider his conscientious objector claim at that time. 32 C.F.R. 1623.2. The Second Circuit so held in *United States* v. *Bornemann*, —— F.2d ——, 2 SSLR 3484 (2d Cir. 1970). The only reasonable reading of the local board chairman's testimony at trial is that the board followed the normal procedure and deferred consideration of McGee's application until he was no longer entitled to a lower classification. App., *infra*, pp. 20a-21a. This interpretation of the board's action is supported by the requirement that a consideration of the merits of petitioner's claim would have required a re-opening and the issuance of a new classification card (SSS Form 110). *Mulloy* v. *United States*, 38 U.S. Law Wk. 4509 (S. Ct. June 15, 1970); *Miller* v. *United States*, 388 F.2d 973 (9th Cir. 1967); *United States* v. *Gearey*, 379 F.2d 915, 922 n. 11 (2d Cir. 1967). The board did not send petitioner a new classification card because it did not consider his claim on the merits.

Nevertheless, when petitioner no longer qualified for a II-S classification and his conscientious objector claim

again came before the board, the board did no more than reaffirm its earlier decision. App., *infra*, p. 22a (Feinberg, *J.*, dissenting). Thus, on neither occasion did the board reach the merits of petitioner's conscientious objector application. As Judge Feinberg notes, an appeal by petitioner of his I-A classification would not have revealed that procedural deficiency since petitioner could not have known about it nor would his file have disclosed it. App., *infra*, p. 24a. Under these circumstances, the interest in requiring exhaustion is particularly insubstantial. The Ninth Circuit Court of Appeals recently agreed with this position:

> "A major premise supporting the requirement of exhaustion is that recourse to the full administrative process might satisfactorily have resolved the debated issues. Accordingly, it is unlikely that a court would require exhaustion if an administrative body's actions constitute a readily discernible error of a type unlikely to be corrected by further recourse to the administrative process and resulting in great injury to a party or to the public." *Craycroft* v. *Ferrall*, 408 F.2d 587, 594 (9th Cir. 1969).

Petitioner submits that the decisions in *McKart* and *McNeil* do not, as the majority below seemed to suggest, carve out a narrow exception to the exhaustion rule, but rather suggest broad disapproval of that rule when it operates to deprive a defendant of a substantial defense to a criminal prosecution. Where, as here, the registrant presents to the Selective Service System all the facts necessary to support an exemption and it is denied him arbitrarily and without a "basis in fact," there is no reason why a court should not review the legality of that classification.

In fact, courts do so all the time in cases where appeals have been taken. If the registrant fails to avail himself of his right to appeal, it should be enough that he forfeits one of his opportunities to secure the desired classification. The courts should still avail themselves of the opportunity to review lawless administrative action. Here, petitioner's board acted lawlessly, both in failing to consider his application and in denying him conscientious objector status without a "basis in fact." That lawless action should not be permitted to stand.

Petitioner respectfully submits that this Court should grant certiorari in order to resolve the conflict between the decision of the Court below and the decision of the Fourth Circuit in *United States* v. *Davis, supra,* and the decisions of this Court in *McKart* v. *United States, supra,* and *McNeil* v. *United States, supra.*

2. Certiorari should be granted because the decision of the Court below, upholding the denial of petitioner's right to a divinity student exemption, is in conflict with the decisions of this Court in *Oestereich* v. *Selective Service System Local Board No. 11*, 393 U.S. 233 (1968) and *McKart* v. *United States*, 395 U.S. 185 (1969).

Section 6(g) of the Military Selective Service Act of 1967, 50 U.S.C. App. §456(g), exempts full-time students of recognized divinity schools who are preparing for the ministry under the direction of recognized churches. See also, 32 C.F.R. 1622.43.

Petitioner's entitlement to a IV-D classification, we believe, is indisputable. That petitioner did not request the

classification is of no consequence. Unlike the language in Section 456(h)(1) of the Act and 32 C.F.R. 1622.25 providing for student deferments, which requires the registrant to request the classification, the language of the ministerial exemption is mandatory; one who qualifies "*shall* be exempt from training and service." Section 456 (g) (emphasis added). See *Oestereich* v. *Selective Service System Local Board No. 11*, 393 U.S. 233 (1968). See also, *Turley* v. *Selective Service System Local Board No. 134*, 301 F. Supp. 845 (C.D. Cal. 1969). This view of the exemption was adopted by the court in *Kimball* v. *Selective Service Local Board No. 15*, 293 F. Supp. 266, 267 (S.D.N.Y. 1968), which assumed that the exemption had to be granted even though not requested.

> "Although [plaintiff] Jack is now a full-time divinity student, he has not sought to be reclassified IV-D. . . . Because Jack was not present at the hearing of this motion and because defendants did not produce his file, it is not clear whether, before this motion, his draft Board was aware of his entitlement to a clear statutory exemption from military service. 50 U.S.C. App. §456(g) . . . . Petitioner here has, before induction, made known his entitlement to exemption. . . . This exemption is mandatory, not permissive. See 50 U.S.C. App. §456(g); 32 C.F.R. 1622.43(a)."

As in *Kimball*, petitioner, although not requesting an exemption, made known to the Government that he qualified for it. In fact, it was the uncontradicted testimony at trial that petitioner advised the Government on at least four separate occasions of his attendance or prospective attendance at divinity school.

In his original Classification Questionnaire (SSS Form 100) completed soon after he registered, petitioner advised

his board that he was preparing for the ministry under the direction of the Roman Catholic Church. App., *infra*, p. 2a. Then in writing President Johnson on April 15, 1967, petitioner said that he had been "accepted for graduate study in a program where I would probably qualify for the theological deferment". The letter was forwarded to his local board on April 26, 1967. App., *infra*, p. 3a.

In May 1967 petitioner was interrogated by two FBI agents, at which time he told them that he had been accepted for admission to Union Theological Seminary, that he would begin studies there in September of that year, and that one of his mailing addresses would be the dormitory at the Seminary. At trial, a third agent testified somewhat ambiguously of a conversation with a board clerk on May 19, 1967, during which he asked her if petitioner's present classification would be changed if he were to attend Union Theological Seminary (T. 71-72).

Finally, in November 1967, petitioner testified before a federal grand jury investigating Selective Service violations and explicitly stated that he was a divinity student at Union studying for the Roman Catholic priesthood (T. 214). The grand jury was convened in the Southern District of New York, and the questioning of petitioner was conducted by John Robinson, the same Assistant United States Attorney who later brought petitioner's indictments and prosecuted the case in the trial court.

The import of these events is apparent. From the time of petitioner's first Classification Questionnaire in 1961, up to and including the time the local board classified him I-A in September 1967, ordered him to report for a physical in

October and ordered him to report for induction in January 1968, it had substantial information to suggest that petitioner was entitled to a IV-D classification.

The majority claims, however, that petitioner did not submit sufficient proof of his entitlement to the IV-D classification, that there was a "basis in fact" for denying petitioner the exemption in that he failed to provide evidence that he was studying "under the direction of" his church. But the procedure directed by Selective Service National Headquarters in Local Board Memorandum No. 56 places this burden on the Local Board. In order to substantiate claims for ministerial exemptions, a local board "must require" the registrant to furnish evidence that:

> "(1) He is a student preparing for the ministry under the direction of a recognized church or religious organization; and
>
> (2) He is satisfactorily pursuing a full-time course of instruction in a recognized theological or divinity school . . ."

Furthermore, the Memorandum directs that:

> "If the local board considers the information it has received to be insufficient for the purpose of making a determination, it should request assistance or additional information from the State Director of Selective Service."

Thus, it was the obligation of the board, upon receiving information that petitioner may have been entitled to a IV-D classification, to solicit the additional information described in the Memorandum.

It is clear from the Memorandum that the duty imposed on the board could not be met by merely sending a Current Information Questionnaire (SSS Form 127) since that form solicits no more information about attendance at divinity school than the board already had in its possession (Govt. Ex. 30, especially "Series V.—Education"). In other words, that form would not have given the information required by Local Board Memorandum No. 56.

As for Assistant United States Attorney Robinson, he acquired personal knowledge in the grand jury room of petitioner's entitlement to a IV-D weeks before an induction order was mailed. Nevertheless, he secured indictments some three months later with full knowledge that the board actions on which they depended were wholly unlawful.[4] Had petitioner been properly classified and thus exempt from service, it is unlikely that any of petitioner's indictments would have been brought.[5]

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[4] This would seem to do clear violence to the letter and spirit of the representation made to the Supreme Court by the Solicitor General in *Oestereich, supra*. In his Brief for the Respondents, arguing that review of the punitive reclassification of a divinity student could be had in a prosecution for induction refusal, the Solicitor General said:

> "... in view of the explicit exemption granted by Section 6(g), the Attorney General would not have started such a prosecution ..." (p. 64)

The Solicitor General goes on to say that if, as in this case, the Attorney General did proceed with a prosecution, "it would have been the clear duty of the court to have dismissed the prosecution on a showing that petitioner comes within the exempted class." (*Ibid.*)

[5] In an official publication of the Selective Service System, *Legal Aspects of Selective Service* (1969), the following statement appears:

(*continued on next page*)

The information given to Robinson was effective notice of petitioner's eligibility for a IV-D even though not given directly to the board. It is not necessary, as the Second Circuit has recognized, that a claim for exemption be made directly to the board. *United States* v. *Stafford*, 389 F.2d 215 (2d Cir. 1968); *United States* v. *Holmes*, —— F.2d ——, 2 SSLR 3489 (2d Cir. 1970). This is in accordance with the position recently taken by Chief Judge Solomon in *United States* v. *Hanna Nickel Smelting Company*, 253 F. Supp. 784, 793 (D. Ore.), *aff'd* 400 F.2d 944 (9th Cir. 1968):

> "The Government, like a private corporation, acquires knowledge through its agents. Under well-established principles of agency, a principal is bound by the knowledge of its agents concerning a matter upon which it is the agent's duty to give the principal information. Restatement Agency 2d § 272. It is no defense that the agent did not, in fact, communicate his knowledge to the principal."

We need not consider the outer limits of this agency principle in all draft cases. Suffice it to say that in this case the information was not conveyed to some remote agent

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"Since the purpose of the law is to provide men for the military establishment rather than for the penitentiaries, it would seem that when a registrant is willing to be inducted, he should not be prosecuted for minor offenses committed during his processing. The result of this procedure is that the great majority of prosecutions involve the failure to report for or refusal to submit to induction or assigned civilian work. . . . By agreement with the Department of Justice, registrants who turned in cards (as contrasted to those who burned cards) were not prosecuted under section 12(a) of the Military Selective Service Law of 1967, but were processed administratively by the local boards" (p. 47).

of the Government in the Food and Drug Administration. Rather it was given to a Justice Department lawyer, intimately familiar not only with Selective Service law but with the young man against whom he ultimately sought indictments. There can be no denying that the Government, before initiating these proceedings, knew that petitioner was in divinity school. That being the case, the statute's command is unequivocal: he *"shall"* be exempt.

In contrast to the statute's mandatory language regarding divinity student exemptions, there is no language in the statute "which would require registrants to raise all their claims before the appeal boards." *McKart* v. *United States*, 395 U.S. 185, 197 (1969). Yet the majority below was of the opinion that the exhaustion doctrine foreclosed judicial review of petitioner's IV-D claim. In effect, the majority allowed a judge-made rule to operate in derogation of rights granted by statute.

Moreover, the judicial convenience which the rule typically serves—to spare courts the burden of hearing evidence more properly presented to the Selective Service System—can no longer be served here. The trial judge took substantial evidence regarding petitioner's entitlement to a ministerial exemption, without objection by the Government. Inasmuch as the trial court, in its discretion, decided to consider the propriety of petitioner's classification, no contrary interest was served by the Second Circuit invoking the exhaustion rule.

The decision below regarding petitioner's claim of a divinity student exemption is in conflict with the decisions of this Court in *Oestereich* v. *Selective Service System Local Board No. 11*, 393 U.S. 233 (1968) and *McKart* v.

United States, 395 U.S. 185 (1969). This is a substantial reason for review.

3. Certiorari should be granted because the Court below, in improperly upholding petitioner's I-A classification and conviction on Count 1, affirmed petitioner's conviction on Counts 2 and 3 without considering what the proper result would have been if the I-A classification were invalid and declined to consider at all the conviction on Count 4.

A. The conviction for refusal to report for a physical examination (Count 2) cannot stand.

The Selective Service regulations permit a board to call for a physical examination only those registrants who are classified I-A, I-O, or I-A-O, 32 C.F.R. 1628.11(b), or, if in another classification, who are subject to imminent induction, 32 C.F.R. 1628.11(c). If petitioner had been properly classified IV-D, the board would have had no reason to believe his induction was imminent and, therefore, he could not have been lawfully ordered to report for a physical examination. If petitioner had been classified I-O, his refusal to submit to the examination would not have been criminal, since Selective Service allows those in that classification to waive the examination without penalty. *Shoemaker* v. *United States,* —— F.2d —— (9th Cir. 1969); *United States* v. *Mendoza,* 295 F. Supp. 673 (E.D. N.Y. 1969); *United States* v. *Walsh,* 279 F. Supp. 115 (D. Mass. 1968). See also, Selective Service System Form 223; Local Board Memorandum No. 14; App., *infra,* pp. 27a-28a (Feinberg, *J.*, dissenting).

B. Since petitioner was improperly classified I-A, he was not guilty of failing to possess a valid notice of classification (Count 3).

Petitioner was indicted for failing to possess the I-A classification card mailed to him in September 1967. The requirement of the regulation is that the registrant possess a *valid* Notice of Classification (SSS Form 110). 32 C.F.R. 1623.5. Since, as shown above, petitioner's classification should have been either IV-D or I-O, his I-A classification was invalid. His failure to possess an invalid card was, therefore, not in violation of the regulation.

Were it otherwise, it would defeat the functions of the possession requirement discussed in *United States* v. *O'Brien*, 391 U.S. 367, 378, 379 (1968). Since none of these functions could be served by a card with an incorrect classification, it is clear that the failure to possess such a card cannot be considered a violation of 32 C.F.R. 1623.5. This position was explicitly adopted in *United States* v. *Hertlein*, 143 F. Supp. 742 (E.D. Wis. 1956).

C. The conviction on Count 4 cannot stand because petitioner substantially complied with the requirement that he submit the information requested by his board.

Petitioner was charged with failing to submit the information solicited by a Current Information Questionnaire (SSS Form 127) mailed to him in July 1967. He was not charged with having failed to return the questionnaire itself. Nevertheless, Judge Murphy charged the jury that they could find the requisite intent under this count merely by determining that petitioner knowingly failed to return the questionnaire. T. 289. Thus, the jury was not told that they should be determining instead whether the information sought by the board was in fact in its possession either at the time the questionnaire was mailed or

was supplied sometime before the bringing of the charges. Had the jury been so instructed, they could reasonably have found that petitioner had provided his mailing address several times during that period and enough information on previous occasions so that the board could easily have classified him in whatever classification for which they found him qualified. The instruction was so fundamentally prejudicial as to compel a reversal of the conviction.

Quite apart from the jury instruction, the prosecution under this count is in clear derogation of the statutory scheme regarding the requirement that registrants supply information affecting their classification. The regulations require that a registrant provide the information necessary to prove his entitlement to deferment. 32 C.F.R. 1622.1, 1622.10, 1623.1(b) and 1641.2(b). Failing to do so, he waives his right to the deferment. *Dickinson* v. *United States*, 346 U.S. 389 (1953). It is hardly reasonable to assume that Congress intended to make his failure criminal as well since the only resulting harm would be to the registrant and not to the system.

That Selective Service contemplates waiver of the deferment as the sole penalty for failing to provide such information is apparent from their recommendation that no prosecution be brought on these grounds, App., *infra*, p. 29a, and from the fact that counsel has been unable to find any reported decision of a prosecution for failure to provide information which would have benefited the registrant. The reported cases all involved a failure by a registrant to provide information which would have proved detrimental to the registrant. See, *e.g.*, *United States* v. *Lembo*, 76 F. Supp. 209 (E.D. Pa.), *rev'd, sub nom. United States* v. *Aleli*, 170 F.2d 18 (3rd Cir. 1948); *United States* v. *Haug*, 150 F.2d 911 (2nd Cir. 1945), *cert. denied*, 324

U.S. 876 (1945); *Stumpf* v. *Stanford*, 145 F.2d 270 (5th Cir. 1944).

Only this approach to non-prejudicial violations of the regulations by registrants explains the failure to prosecute the many registrants who submit to the draft by foregoing deferments available to them. It also accords with the well-recognized principle in Selective Service cases that violations of the regulations by a local board will invalidate an induction order only where there is some showing of prejudice to the registrant. See, *e.g.*, *United States* v. *Lawson*, 337 F.2d 800 (3rd Cir. 1964). Justice and good sense dictate that this be the rule where a registrant's violation of a regulation is only technical.

Although there are no cases directly holding that the failure to provide information not prejudicial to the System is not criminal, the concurring opinion of Judges Learned Hand and Swan in *United States* v. *Rubenstein*, 166 F.2d 249 (2d Cir. 1948) seems to take this position and *Bartchy* v. *United States*, 319 U.S. 484 (1943) suggests that the requirement to advise the board of a mailing address is met by substantial compliance.

D. Petitioner here received concurrent two-year sentences on four counts. This sentence was admittedly within the trial judge's authority. However, as Judge Feinberg noted, if petitioner had been properly classified I-O or IV-D in September 1967 by his local board, the alleged violation leading to indictment on Count 2 would never have occurred and the prosecutions on Counts 3 and 4 may never have been brought. Indeed, the Selective Service authorities did not even recommend prosecution on Count 4. App., *infra*, p. 29a.

Moreover, Judge Feinberg questioned whether the trial judge or jury would have reached the same results if they had been asked to try a registrant possessing divinity student or conscientious objector status on Counts 3 and 4. He also questioned whether the judge, assuming he realized that petitioner should have been classified I-O or IV-D, would have rendered a shorter sentence or possibly probation if petitioner had only been found guilty on Counts 3 and 4. App., *infra*, pp. 28a-29a.

CONCLUSION

For the reasons stated above certiorari should be granted.

Respectfully submitted,

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* Attorney for Petitioner gratefully acknowledges the invaluable assistance of Mr. Robert L. Robinson, a recent graduate of the Columbia University School of Law.

APPENDIX

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 177—September Term, 1969.

(Argued September 30, 1969 Decided March 31, 1970.)

Docket No. 33568

UNITED STATES OF AMERICA,

Appellee,

—against—

VINCENT FRANCIS MCGEE, JR.,

Defendant-Appellant.

Before:

FRIENDLY, SMITH and FEINBERG,

Circuit Judges.

Appeal from a judgment of the District Court for the Southern District of New York, Thomas F. Murphy, *Judge*, convicting appellant, after a verdict, on a four-count indictment for violating 50 U.S.C. App. §462(a). Affirmed.

ALAN H. LEVINE, New York, N. Y. (Marvin M. Karpatkin, J. Edward Meyer, III, on the brief), *for Defendant-Appellant.*

ROSS SANDLER, Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, James D. Zirin, Assistant United States Attorney, on the brief), *for Appellee.*

FRIENDLY, *Circuit Judge*:

Vincent Francis McGee, Jr. appeals from a judgment of conviction for violating 50 U.S.C. App. §462(a), following a trial before Judge Murphy and a jury in the District Court for the Southern District of New York. McGee was convicted on all four counts of the indictment and was sentenced to imprisonment for two years on each count, the terms to run concurrently. The indictment charged him with refusing to submit to induction (Count 1), to report for a physical examination (Count 2), to possess a valid notice of classification (Count 3), and to submit information that his local board had requested (Count 4).

I.

McGee is a Roman Catholic who is currently a student at the Union Theological Seminary in New York City. He registered with Local Board 15 in Manhattan in August 1961, and informed the board a month later that he was "a student preparing for the ministry at the Cathedral College of St. Joseph's Seminary . . . under the direction of Roman Catholic Church." He took a leave of absence from the College in 1963, during which period his board classified him I-A. In August 1964, he passed the pre-induction physical that his board had ordered. A short time later, after enrolling in the University of Rochester, he was granted a II-S (student) deferment. He was temporarily reclassified I-A in September 1965, but his II-S classification was renewed shortly thereafter. In February 1966, while still classified II-S, McGee requested conscientious objector status, stating that it was his "intention to continue on to actual ordained Priesthood." The clerk of his board wrote him on March 23:

This will advise that the recent evidence submitted, concerning your case has been reviewed by the Local Board. It is the decision of the Board that such evidence does not justify the reopening of your case and reconsideration of your present classification.

However, we wish to advise that your claim as Conscientious Objector will be considered when you no longer qualify for a student classification.

McGee did not appeal this decision; he later requested and was granted a further II-S classification in October 1966.

In April 1967, while still classified II-S and enrolled in the University of Rochester, McGee wrote President Johnson, enclosing remnants of his torn and burnt draft card. This letter stated that even though he had "already been accepted for graduate study in a program where" he "would probably qualify for the theological deferment," he felt it necessary to "sever every link with violence and war" and to refuse to cooperate "with the military-industrial complex which seems to be dictating our international policy." McGee's local board received a copy of this letter, apparently considered reopening his classification and decided against it, and, in any event, did not change his II-S classification and deferment. Following McGee's graduation from the University of Rochester in June 1967, his board sent him a Current Information Questionnaire. McGee returned it unanswered, and in a covering letter announced that "further correspondence" from the draft board would "simply be returned unopened," consistent with his belief that "cooperation is approval." On September 19, 1967, almost two months after receipt of this letter by the local board, McGee was reclassified I-A. The Board mailed him a notice of classification and a letter clearly informing him that he had a right to ask for a per-

sonal appearance or an appeal within 30 days, that the board had a Government Appeal Agent to aid him "with a personal appearance, an appeal, or any other procedural right," and that the Appeal Agent or his representative would give him legal counsel on Selective Service matters at no charge. McGee returned this unopened, writing on the envelope

> Returned pursuant to previous
> declaration and notification.

McGee also returned unopened an order directing him to appear for a physical examination scheduled for October 18, 1967, and did not appear for it. He returned a delinquency notice sent on November 22, 1967. McGee did open his induction notice, which was sent on January 11, 1968, and did report for and pass a physical examination at the induction center. However, he refused to submit to induction.

Meanwhile, McGee had matriculated in the Union Theological Seminary as a full-time student on September 27, 1967. At no time did he request a IV-D (student for the ministry) classification from his draft board, but he claims that his letter to the President in April 1967, an interview with two FBI agents in May 1967, and testimony before a grand jury in November 1967, gave his board sufficient information to require classifying him IV-D. At trial, it was established that the Union Theological Seminary is non-denominational, and that McGee's parish priest recommended him to the Seminary. The chairman of McGee's draft board testified outside the presence of the jury that before McGee was classified I-A in September 1967, all pertinent information in his Selective Service file was reviewed. Judge Murphy found that the board considered and rejected appellant's conscientious objector claim.

McGee argues that his local board acted unlawfully in classifying him I-A in September 1967, when in his view he should have been classified IV-D or I-O. On that premise he claims that he cannot be convicted of refusing to submit to induction (Count 1) because his order to report for induction was illegal; that he cannot be convicted of refusing to report for a physical examination (Count 2) because if he had been properly classified, he would not have been called for a physical or, if called, could have waived the examination without penalty; and that he cannot be convicted of failing to possess a valid notice of classification (Count 3) because his I-A classification was invalid. He also argues that he cannot be convicted of failure to supply information to his local board (Count 4) because he substantially complied with its request and because any information not supplied was favorable to him.

II.

We shall deal first with McGee's claim that he was entitled to exemption from military service as a matter of law under 50 U.S.C. App. §456(g), which provides that:

> [S]tudents preparing for the ministry under the direction of recognized churches or religious organizations, who are satisfactorily pursuing full-time courses of instruction in recognized theological or divinity schools . . . shall be exempt from training and service (but not from registration) under this title.

McGee contends that the statutory policy is so strong that the exemption may not be denied any registrant who meets the qualifications. He concedes that he did not request the exemption from his board, but claims that no such request

is required by the statute or regulations. In any event, he argues that the local board had sufficient knowledge of his qualification for the exemption to require its issuance.

It is true that section 456(g) is a mandatory provision in the sense that a draft board may not deny a IV-D exemption to one who qualifies for it. *Oestereich* v. *Selective Service System Local Board No. 11*, 393 U.S. 233 (1968).[1] However, it does not follow that a registrant may totally disregard the administrative procedures established by the Selective Service System, and rely on his own evaluation of his right to a IV-D classification in the hope that a court will subsequently support his interpretation. While *McKart* v. *United States*, 395 U.S. 185, 195 (1969), states that "[i]n Selective Service cases, the exhaustion doctrine must be tailored to fit the peculiarities of the administrative system Congress has created," it recognizes that the exhaustion doctrine may well be applicable to IV-D claims like McGee's, where the registrant is relying on facts never clearly presented—or indeed presented at all—to his local board.

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1 McGee attempts to bring his case within *Oestereich*, *supra*, on the further ground that he was denied IV-D and classified I-A as punishment for burning his draft card, writing to President Johnson, and refusing to cooperate with his local board. Apart from any other considerations, the record simply does not establish this contention. McGee wrote to the President, enclosing remnants of his draft card, in April 1967. His local board received a copy of this letter on April 27. However, appellant was not classified I-A until September 19, 1967, when his II-S deferment expired following his graduation from the University of Rochester. This was almost five months after the board was informed of the letter to the President and almost two months after McGee announced his intention to return board correspondence unopened. These are hardly the actions of a draft board that is acting lawlessly. Moreover, *Oestereich* is further distinguishable because appellant there sought redress through the Selective Service System and was unjustifiably deprived of a IV-D exemption which he had already obtained. McGee never applied for a IV-D classification and it is impossible to perceive how the local board could have punitively deprived him of an exemption he had never requested.

> Of course, it is necessary that the local board, which has the responsibility of classifying registrants in the first instance, be given the information necessary to perform its function. However, the present case does not present an instance where a registrant is trying to challenge a classification on the basis of facts not presented to the local board. In such a case, the smooth functioning of the system may well require that challenges to classifications based upon facts not properly presented to the board be barred.

395 U.S. at 198 n. 15.

McKart dealt with the proper interpretation of the "sole surviving son" exemption, 50 U.S.C. App. §456(o), which the Court found to be only a question of statutory interpretation and "certainly not a matter of discretion." *Id.* at 198. Accordingly, it refused to apply the exhaustion doctrine in that case because there was "simply no overwhelming need" to have the Selective Service System "resolve this question in the first instance, at least not where the administrative process is at an end and the registrant is faced with criminal prosecution." *Id.* at 199. McKart's claim was thus in sharp contrast to "classification questions which do involve expertise or the exercise of discretion, both by the local boards and the appeal boards." *Id.* at 198. Thus,

> Conscientious objector claims . . . or deferments for those engaged in activities deemed "necessary to the maintenance of the national health, safety, or interest" . . . would appear to be examples of questions requiring the application of expertise or the exercise of discretion. In such cases, the Selective Service System and the courts may have a stronger interest in having the

> question decided in the first instance by the local board and then by the appeal board, which considers the question anew.

Id. at 198 n. 16. In further distinguishing the earlier body of cases which did apply the exhaustion doctrine, the Court noted that:

> [T]hose cases all involved ministerial or conscientious objector claims, claims that may well have to be pursued through the administrative procedures provided by the Selective Service laws.

Id. at 201.

McGee's claim for a IV-D exemption here depended upon resolution of essentially factual issues which are by no means conceded. This distinguishes such cases as *McKart, supra,* where the facts were undisputed, and *Oestereich, supra,* where the board had already recognized the registrant's right to a IV-D classification.[2] Whatever the draft board's determination might have been had McGee applied to it for IV-D status and supplied it with full information, even the facts adduced *at trial,* as will be seen below, do not show that he was so clearly entitled to that exemption that the draft board could have arrived at but one conclusion. Accordingly, McGee's failure even to request a IV-D exemption from the local board or supply it with any supporting information is a sufficient ground for disposition of that claim.

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2 For other cases where the claim by a student to a IV-D classification raised factual issues, see *Eagles* v. *United States ex rel. Samuels,* 329 U.S. 304, 316-17 (1946) (nature of the seminary, motives of the registrant); *United States* v. *Bartelt,* 200 F.2d 385 (7 Cir. 1952) (whether registrant was full-time divinity student); *United States ex rel. Levy* v. *Cain,* 149 F.2d 338 (2 Cir. 1945) (nature of seminary and studies, registrant's intentions).

Beyond that it is plain that denial of a IV-D exemption to McGee would have had a "basis in fact." Under section 456(g), at least two requirements must be satisfied before a divinity student becomes entitled to a IV-D exemption: He must be a student preparing for the ministry under the direction of a recognized church or religious organization; and he must be satisfactorily pursuing a full-time course of instruction in a recognized theological or divinity school. As to the latter, it is clear that at the time McGee refused induction[3] he was a matriculated student at the Union Theological Seminary who was satisfactorily pursuing a full-time course of study. What is in dispute, however, is whether McGee was preparing for the ministry under the *direction* of a recognized church or religious organization. There is evidence in the record that McGee is a Catholic and that he intends ultimately to become a priest, but the evidence that he was studying under the direction of the Catholic Church when he refused induction is slim. His parish priest testified that he had recommended McGee to the Seminary, but that could have meant no more than that he thought McGee to be a serious and decent young man. The priest did not say he was in any way supervising McGee's course of study. According to the record, the divinity school in which McGee enrolled is non-denominational and may contain many students who have not formulated the intention of entering the ministry and are not under the direction of any church or religious organization. The record discloses that at least some of the Catholic students at the school come from Catholic seminaries to take courses there, but McGee did not. Indeed, McGee apparently had been a student at such a

3 We assume only for purposes of discussion that this is the key date, rather than some earlier time, e.g., date of reclassification by the board.

Catholic seminary, but left to go to Hunter College and then the University of Rochester, where he received a Bachelor of Science degree.[4] Accordingly, McGee's local board would not have had to conclude that he was "preparing for the ministry under the direction of" the Catholic Church. Perhaps the board would have granted the exemption had McGee made the claim directly to it; perhaps it would not. But we cannot say that if it had followed the latter course, there would have been "no basis in fact" for its action.[5]

III.

In contrast to his inaction with respect to the IV-D claim, McGee had squarely placed his I-O application before the local board when he requested and completed the Special Form for Conscientious Objector in February 1966.[6]

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4 While at the University of Rochester, McGee took some courses at Colgate Rochester Divinity School.

5 McGee claims that the trial judge incorrectly read into the statute a requirement that the divinity school itself be under the direction of a recognized church or religious organization in order that its students can qualify for a IV-D exemption. Such an interpretation of the statute would indeed be wrong since it is the student, not the school, to whom that language applies. However, we do not believe the trial judge thus misinterpreted section 456(g). Having found, correctly, that Union Theological Seminary is "a non-denominational seminary," he did not treat this as dispositive of the IV-D claim, but rather refused to treat proof of full-time attendance at a recognized non-denominational divinity school as alone supplying the other prerequisite for the exemption. In other words the finding indicated only that since Union Theological Seminary was non-denominational, the nature of the school could not of itself supply the missing element of "direction," as, for example, might be the case for a denominational seminary. We agree with that conclusion. Cf. *Eagles* v. *United States ex rel. Samuels*, 329 U.S. 304, 310, 316-17 (1946); *United States ex rel. Levy* v. *Cain*, 149 F.2d 338, 341 (2 Cir. 1945).

6 While McGee never protested the draft board's action, neither did he ever withdraw the application. The Government makes a fleeting argument that McGee "no longer desired a I-O deferment." If by this

He contends that there was no basis in fact for denying his conscientious objector claim and that his reclassification as I-A was thus unlawful.

We would be inclined to accept the first step in McGee's argument. In his Form 150 he expressed his belief "in a personal Supreme Being to whom obligation is superior when duties of human relations are considered," and said that "taking part in any form of military operation indicates an approval/consent situation repugnant . . . to love and service of God and fellow man." These and other statements, if sincere, established that he, "by reason of religious training and belief, is conscientiously opposed to participation in war in any form." 50 U.S.C. App. §456(j). Neither his prior nor his subsequent actions were inconsistent with his assertions, see *United States* v. *Haughton*, 413 F.2d 736, 742 (9 Cir. 1969), and we see nothing in McGee's file—all that was before the board—that could reasonably put his sincerity in issue. This is particularly significant in light of the board chairman's testimony that McGee's local board did not require an interview for conscientious objector applicants, although it undoubtedly could have.[7]

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is meant that McGee had withdrawn his request for I-O, it is incorrect, as the Board was never so notified. Selective Service procedures then and now in force make clear that such a claim would have had to be withdrawn in writing. Local Board Memorandum No. 41, as amended, August 15, 1952, reported in Selective Service Law Reporter ("S.S.L.R.") 2174 (including amendments of July 30, 1968, which are not here relevant). Moreover, McGee's letter to his board, dated July 23, 1967, in which he announced his policy of non-cooperation, restates his "personal conscientious commitment."

7 The Selective Service System currently advises a local board that if it determines that it cannot grant the I-A-O or I-O classification claimed, the local board should invite or request the registrant to meet with it for an interview prior to classification. The primary purpose of the interview will be to develop further facts on which the conscientious objector claim is based, and the sincerity of such

While in this case we have the benefit of the testimony of the chairman of the local board, that does not reveal any "basis in fact" for denying McGee's application. As indicated, the statement of beliefs in his Form 150 would seem to meet the statutory test, and what little testimony there is by the board chairman concerning McGee's sincerity would, if anything, support a conclusion that the local board thought McGee was sincere. He testified that McGee "had been offered an alternative to the deferment he sought, which was a 1-O, hospital service. He did not choose to avail himself of that." He further testified that "[t]here was a letter written . . . where we were advised that the young man would not accept a 1-O or inferred that he wouldn't." This testimony was inaccurate. The letter referred to was by John A. Murray, dated February 1966; far from indicating that McGee would not accept a I-O, it was in support of his application.[8]

Acceptance of so much of McGee's argument still does not lead to his conclusion unless he is to be excused from failure to appeal his I-A classification. We see no reason for doing so. To the passages from *McKart* already quoted, we add another, 395 U.S. at 200:

> [T]oday's holding does not apply to every registrant who fails to take advantage of the administrative

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claim. This interview does not take the place of the personal appearance which the registrant may request under Section 1624.1, after the classification action.

Local Board Memorandum No. 41, as amended July 30, 1968, *supra* note 6.

8 What the chairman of the board may have meant was that McGee's application for I-O indicated that even if he were granted such a I-O, he would not report for alternative civilian service, as required under the Act. However, this eventuality never came to pass. In any event, on this record we would not regard McGee's statement that he would not accept alternate service as a "basis in fact" for denying a I-O classification.

remedies provided by the Selective Service System. For, as we have said, many classifications require exercise of discretion or application of expertise; in these cases, it may be proper to require a registrant to carry his case through the administrative process before he comes into court.

Mr. Justice Marshall listed four factors that ordinarily justify application of the exhaustion doctrine to bar a defendant from challenging a local board's classification: (1) "judicial review may be hindered by the failure of the litigant to allow the agency to make a factual record, or to exercise its discretion or apply its expertise"; (2) judicial efficiency may be furthered because a "complaining party may be successful in vindicating his rights in the administrative process"; (3) notions of administrative autonomy require that the agency be given a chance to discover and correct its own errors"; and (4) "it is possible that frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures." 395 U.S. at 194-95. All the last three factors are present here. An appeal might well have led to McGee's obtaining a I-O classification and have avoided the judicial—and prosecutorial—effort that his flouting of the processes of the Selective Service System has caused. The System should have been given an opportunity to correct the error of the local board. And sanctioning McGee's deliberate refusal to avail himself of procedures which the Government had made available to him would encourage others to do so, especially in cases where the chances of success in court seem good.

On all this we find ourselves in agreement with the sensitive opinion of Judge Goodrich and in disagreement

with the able dissent of Judge Maris in a case strikingly similar to McGee's, *United States* v. *Palmer*, 223 F.2d 893 (3 Cir.), *cert. denied*, 350 U.S. 873 (1955). We agree also with the decision of another court of appeals, made in the light of *McKart*, which refused to excuse failure to appeal the revocation of a hardship deferment, *United States* v. *Powers*, 413 F.2d 834 (1 Cir. 1969).[9] The entire subject has just been exhaustively canvassed by the Ninth Circuit in *Lockhart* v. *United States*, decided December 18, 1969, 2 SSLR 3432, and we agree with Judge Ely's opinion for a majority of the court *in banc*. Moreover, the position taken by the two dissenting judges supports "forfeiture of judicial review" for failure to exhaust "when the registrant has deliberately sought to subvert and evade the administrative process," the situation here, as distinguished from a case where the "default was merely inadvertent or negligent."

Our brother Feinberg argues for a different result on the basis that the board "never passed on" the conscientious objector claim. We do not read the record that way. The board chairman, called as a defense witness at the trial in November 1968, said that when the McGee conscientious objector application was filed in 1966, he thought "there weren't sufficient facts . . . to motivate me to grant the registrant the request he sought" and that "what he set forth did not motivate me to grant him the relief he sought." He denied instructing the clerk to write that the conscientious objection claim had not been considered—a point on which the letter was ambiguous. He stated also that when the board gave McGee a I-A classification in 1967, "we again reviewed what appeared in the file," that

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9 So far as we have been able to determine, *United States* v. *McNeil*, 401 F.2d 527 (4 Cir. 1968), vacated and remanded for further consideration in the light of *McKart*, 395 U.S. 463 (1969), has not been again decided.

"we reviewed the record of the young man's case when we gave him the I-A and all pertinent information therein contained," and that "the board considered the whole file before it reclassified Mr. McGee I-A on September 19, 1967." While the chairman also testified that "based on our previous determination that his request for conscientious objection status was denied, we had no alternative at that time but to give him a I-A," we read this as meaning only that the chairman remembered the Board's dissatisfaction with McGee's showing when his application was examined in early 1966 and that the Board saw no reason to change their minds eighteen months later. Judge Murphy, who saw and heard the witness, found "as a fact that the draft board considered the defendant's application for a conscientious objector status and that was considered by the whole board on September 23." We do not see how this finding can be regarded as "clearly erroneous."

However, even if there had been an inadvertent failure to consider the conscientious objection claim in September 1967, as the dissent assumes, we would reach the same conclusion. This is precisely the kind of thing that a personal appearance or a conference with the Appeal Agent, which McGee was invited to have in the letter he returned unopened, would have been almost certain to reveal, with the result that the board would have passed on the merits of McGee's claim. Quite possibly it would have acted favorably; if it had not, the error would very likely have been corrected on appeal.[10] Despite their name, appeal boards do not perform simply a reviewing function. "It is universally held that the Appeal Board considers matters

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10 Communication between the appeal board and the local board could well have developed the true facts.

of classification *de novo* and its classification is one of first instance, not a mere affirmance or reversal of the Local Board, and that any such prejudice on the local level is cured by a fair consideration on the appeal," *De Remer* v. *United States,* 340 F.2d 712, 719 (8 Cir. 1965) (citing cases). See 32 C.F.R. §1626.26; *McKart* v. *United States, supra,* 395 U.S. at 198 n. 16; *Storey* v. *United States,* 370 F.2d 255, 260 (9 Cir. 1966) (citing cases); *Clay* v. *United States,* 397 F.2d 901, 912-13 (5 Cir. 1968), *vacated and remanded on other grounds,* 394 U.S. 310 (1969); Note, *The Selective Service,* 76 Yale L.J. 160, 171 (1966). As already indicated, the fact that McGee had a good factual case for appeal in no way points against insistence on his taking one; a case of statutory construction like *McKart* differs since on such a matter there is a positive advantage in resort to the courts which alone can decide the issue authoritatively and uniformly for the benefit of all registrants. Instead McGee's stiff-necked refusal to have any dealings with the Selective Service System has caused the expenditure of countless hours by prosecutors, grand and petit jurors, and judges of the trial and appellate courts. If we were free to look at his case alone, we might still be tempted to take the charitable view of our dissenting brother. But if we should do that in McGee's case, we would be obliged to do it in every other similar one. Of course it seems "harsh" when the exhaustion requirement results in a conviction for refusal to submit to induction by a registrant with a seemingly good claim for exemption. But one of the main points of the exhaustion doctrine is to relieve the courts from having to consider claims that ought to be dealt with in the first instance by administrative agencies; it canot properly be limited to those persons whose claims would fail in court anyway.

While there are exceptions to the rule requiring a conscientious objector to appeal from a denial of his claim, none comes close to this case. Claimants are not required to exhaust administrative remedies in order to attack the constitutionality of the statute, *United States* v. *Sisson*, 294 F. Supp. 520 (D. Mass. 1968) (Wyzanski, *J.*), *probable jurisdiction noted*, —— U.S. —— (1969), or the regulations, *United States* v. *Branigan*, 299 F. Supp. 225, 233-36 (S.D.N.Y. 1969) (Weinfeld, *J.*), on the sensible ground that since local and appeal boards have no authority to determine constitutional claims, exhaustion would be a useless formality. Another qualification to the appeal requirement relates to "exceptional and unusual circumstances *underlying the failure to appeal*," *Thompson* v. *United States*, 380 F.2d 86, 88 (10 Cir. 1967) (emphasis added). But that line of cases holds only that neglecting to appeal is not a bar to judicial review of classification if the registrant's failure was justified. Examples are *Donato* v. *United States*, 302 F.2d 468 (9 Cir. 1962) (registrant received notice of classification while away on firefighting duties; by the time he returned the period for appeal had lapsed); *Glover* v. *United States*, 286 F.2d 84 (8 Cir. 1961) (registrant had unsuccessfully appealed a prior classification; when he received his fifth notice of classification, an exact duplicate of the fourth, there was no reason to expect him to go through the process again in the absence of an explanation from the board for the new notice);[11] *Powers* v. *Powers*, 400 F.2d 438 (5 Cir. 1968) (registrant given misinformation by the secretary of the local board regarding right to appeal); *United States* v. *Harris*, 302 F. Supp. 1194 (D. Ore. 1968) (registrant not charged with knowl-

11 The language from the opinion quoted in the dissent must be read in this context.

edge of right to appeal since he had little education and read with difficulty). The "exceptional circumstances" doctrine was recently reaffirmed and perhaps extended in *United States* v. *Davis*, 413 F.2d 148 (4 Cir. 1969), which held that the local board's failure to advise the registrant of the availability of a government appeal agent excused him from exhaustion: "If an Appeal Agent does nothing more than advise a registrant that he may lose his right to contest his classification when he is criminally prosecuted in the district court by failure to administratively appeal, it would seem to be worthwhile." But that cannot avail McGee who had advised the local board in no uncertain terms that he would not read anything they sent him, and would not have appealed no matter what he was told. While McGee's motives for taking this attitude may have been of the highest, they do not excuse his failure to seek the relief which the law afforded him. To countenance this would needlessly multiply the already heavy burden that cases like his are imposing on the courts.

IV.

We therefore affirm McGee's conviction on Count 1 for refusing to submit to induction. Since his claims with respect to Counts 2 and 3 hinge on the alleged impropriety of his I-A classification, we affirm the convictions on these counts also, without any need to consider what the proper result would be if we had held the I-A classification invalid. In light of the concurrent sentences there is no need to consider the conviction under Count 4 under the circumstances here presented.

Affirmed.

FEINBERG, *Circuit Judge* (dissenting):

I respectfully dissent.

The Supreme Court has recently told us that "it is well to remember that use of the exhaustion doctrine in criminal cases can be exceedingly harsh." *McKart* v. *United States*, 395 U.S. 185, 197 (1969). This case shows how harsh that concept can be, particularly when—as here—it is applied unnecessarily. The record shows that there was apparently no basis in fact for denying the conscientious objector claim of Vincent Francis McGee, Jr. (as to this, we all agree), McGee presented his claim in timely fashion to his local draft board, and that body never passed on the merits of the claim. Despite this, the doctrine of exhaustion of remedies, born in the placid area of administrative law, is invoked thereby consigning McGee to jail for two years. That is too "harsh" for me.

As the majority opinion points out, McGee did present his I-O claim in full to his local board in February 1966. Examination of the record compels the conclusion that McGee's local board did not at that or any other time consider his I-O application on the merits. The board refused to consider his initial application for I-O on the ground that he was then a student, and eighteen months later, in September 1967, refused to classify McGee I-O on the ground that his claim had already been rejected.

32 C.F.R. §1623.2 requires that "the registrant shall be classified in the lowest class for which he is determined to be eligible." Since II-S (student deferment) is a lower class than I-O according to the hierarchy set forth in that regulation, it would have been improper for the board to grant McGee a I-O so long as he held a II-S, which he unquestionably did at the time he first presented his I-O claim. Thus it is difficult to understand the majority's

contention that the local board's letter to McGee dated March 23, 1966 was "ambiguous" on whether the I-O claim had been considered on the merits at that time. McGee then held a II-S classification. Under the regulation, therefore, consideration of the merits of McGee's I-O claim would have been a fruitless task for the board since it would in any event have been obliged to leave his II-S status unchanged. The letter itself advised McGee that "your claim as Conscientious Objector will be considered when you no longer qualify for a student classification"—in light of the regulation, that seems a statement of reason which is plain enough for me. And if there were any ambiguity left, the testimony of the board chairman resolves it in favor of the conclusion that in February-March 1966, McGee's I-O claim was not considered on the merits. While the majority correctly points out that the chairman testified that when the application was first filed in 1966, "there weren't sufficient facts . . . to motivate me to grant the registrant the request he sought," and that "what he set forth did not motivate me to grant him the relief he sought," he also testified that he rejected the application "at that time . . . *because the young man was attending college* and in my judgment he rated a 2S qualification which we proceeded to give him." (Emphasis added.) Almost immediately thereafter the following interchange took place:

> Q. I believe you said before that it was because of his beliefs that you failed to grant him a CO?
>
> A. I did not say anything at all about his beliefs. You can refer to the record. I said in my opinion what he set forth did not motivate me to grant him the relief he sought.

Then came the following interchange between the government attorney and the board chairman (Mr. Lande):

Mr. Robinson: Your Honor, I think Mr. Lande has testified that Mr. McGee was a student at that time and therefore they gave him a 2S classification.

The Witness: I did state that.

In light of the regulation, the letter received by McGee, and the board chairman's own testimony, the conclusion seems inescapable that when McGee applied for I-O in 1966 his claim was properly not considered on the merits, but was denied because he held a II-S classification at that time.

The record also indicates quite clearly that when McGee was classified I-A in September 1967, his I-O application was rejected on the ground that it had previously been considered and rejected, notwithstanding the fact that the initial rejection was not on the merits. It is true, as the majority points out, that the trial judge found that the local board "considered the defendant's application for a conscientious objector status and that was considered by the whole board on September 23," and also true that the chairman testified that the board "reviewed the record of the young man's case when we gave him the 1A and all pertinent information therein contained." However, he also testified as to the nature of that review:

> The Witness: To the best of my recollection . . . at that time [September 1967] the registrant was no longer in school. *Based on our previous determination that his request for conscientious objection status was denied,* we had no alternative at that time but to give him a 1A, which we did.
>
> Q. You didn't consider the conscientious objector claim again because it had been denied previously?
>
> A. Yes— [Emphasis added.]

Thus it is clear that the basis for denying I-O status in September 1967 was the previous denial in February-March 1966 when the application was first submitted. And, as already noted, the record is even clearer that this initial consideration in February-March 1966 did not deal with the merits of the application or the nature or sincerity of McGee's beliefs, but was based on the fact that he was a student with a II-S classification, who was not, for that reason, eligible for I-O status. At no time did the board pass on the merits of McGee's claim, even though, as the trial judge found, the application was "considered" by the board in September 1967.

The majority takes the position that "the chairman remembered the Board's dissatisfaction with McGee's showing when his application was examined in early 1966 and that the Board saw no reason to change their minds eighteen months later." However, the chairman did not testify concerning such memory. As noted, he did testify: "I did not say anything at all about his beliefs." Such an evaluation of McGee's beliefs was not necessary in February 1966 because McGee was then ineligible for I-O because of his II-S. Moreover, the chairman's testimony made clear that he did not discuss McGee's case with other members of the board in February 1966. In any event, the record establishes that neither the chairman alone nor the entire board ever considered whether McGee's beliefs were those of a sincere conscientious objector to war.

Such a failure to consider McGee's claim on the merits was a clear error by the local board, which one would think requires setting aside an order for induction. The board's failure was not only a blunder, but it also violated a selective service regulation, which commands it "to receive *and consider* all information, pertinent to the classification of a

registrant, presented to it," 32 C.F.R. §1622.1 (emphasis added), and undoubtedly violated the statute as well. E.g., 50 U.S.C. App. 455(a)(1):

> The selection of persons for training and service . . . shall be made in an impartial manner, under such rules and regulations as the President may prescribe . . . .

Yet, we are told that the board's order should not be invalidated because McGee failed to utilize appellate remedies within the Selective Service System. I do not agree that we are required to invoke the doctrine of exhaustion in this case. It is true that *McKart, supra,* contains strong indications, quoted by the majority, that even the limited failure to exhaust present here may sometimes be fatal. But I do not read that case as necessarily and invariably preventing the defense of invalid classification when the registrant did give all the facts to the local board, especially where the record indicates that the local board applied no "expertise" in its ultimate decision and actually did not consider the classification on the merits at all. Compare *McKart, supra,* 395 U.S. at 198 n. 16. The language of *Glover* v. *United States,* 286 F.2d 84, 90-91 (8th Cir. 1961), may appropriately be applied to McGee's I-O claim:

> We adhere to the general rule as to the necessity for exhaustion of administrative remedies in order to obtain a judicial review, and are of the opinion that such rule is generally applicable and usually necessary. However, we are of the view that such general rule is not absolute, inflexible and without exception, but that it is to be relaxed only under extremely exceptional and unusual circumstances. The factual situa-

tion presented in this case is appropriate for and requires the relaxation of such rule.

Cf. *Wolff* v. *Selective Service Local Board No. 16*, 372 F.2d 817, 825 (2d Cir. 1967).

The facts as to McGee's I-O claim are sufficiently unusual to allow us properly to depart from the exhaustion doctrine: McGee presented a strong case for a I-O classification; his local board did not require a personal interview as a prerequisite for processing such a claim; McGee's file contains no information reasonably contradicting his claim; the board chairman inaccurately thought that a letter in support of McGee advised the board that McGee would not accept a I-O; and when the board did "consider" the application, it dismissed it on the inaccurate assumption that the claim had already been rejected on the merits.

Finally, and perhaps most important, the failure of the local board to consider McGee's claim on the merits could not have been called to the attention of an appeal board because McGee could not know about that error and nothing in the record would disclose it. It is true that the appeal board might have reversed the denial of a I-O classification to McGee simply because it thought that he had made out a sufficient case. But that should not be dispositive in deciding whether to apply the exhaustion doctrine here. The appeal board might also have regarded the case, on the record as then known, as a close one which could go either way on the facts. Accordingly, even though review by the appeal board is *de novo*, the balance might have been tipped either way by a desire not to set aside the action of a local board. In such a case, a fair determination of the claim on the merits by the local board would be crucial. And, of course, that is precisely what McGee did

not get. In *Knox* v. *United States*, 200 F.2d 398, 402 (9th Cir. 1952), the Ninth Circuit met the argument that a *de novo* review by an appeal board cured the failure of the local board to consider evidence supporting a claim of conscientious objection. The court rejected that contention as follows:

> Classification by the local board is an indispensable step in the process of induction. The registrant is entitled to have his claims considered and acted upon by these local bodies the membership of which is composed of residents of his own community. An underlying concept of the Selective Service System is that those subject to call for service in the armed forces are to be classified by their neighbors—people who are in a position to know best their backgrounds, their situation and activities.

This language in *Knox* has been cited with approval by the Ninth Circuit, most recently in *Welsh* v. *United States*, 404 F.2d 1078, 1083 (9th Cir. 1968), cert. granted, 396 U.S. 816 (1969), as well as by our own, *Mintz* v. *Howlett*, 207 F.2d 758, 762 (2d Cir. 1953), although we distinguished the latter case in *United States* v. *Corliss*, 280 F.2d 808, 816-18 (2d Cir.), cert. denied, 364 U.S. 884 (1960) (claim of procedural unfairness but not failure to consider on merits).

It is true that there are compelling reasons behind the exhaustion doctrine, and I do not suggest that the requirement be cast aside when the registrant ignores the local board altogether and gives it no facts at all. Nor is it necessary in this case to resolve the issue whether failure to appeal denial of a I-O claim should generally

be fatal at a subsequent criminal trial to the defense of invalidity of a I-A classification, a question which has recently split the Ninth Circuit, *Lockhart* v. *United States*, —— F.2d ——, 2 S.S.L.R. 3432 (9th Cir. 1969) (*in banc*) (8-2); cf. *United States* v. *Palmer*, 223 F.2d 893 (3d Cir.) (*in banc*) (4-3), cert. denied, 350 U.S. 873 (1955). I would hold only that the exhaustion doctrine need not be inexorably applied when the basic error of the local board could not be disclosed by the appeal, and should not be invoked when the registrant did give all of the pertinent information to the local board and it never passed upon the merits at all. On this record, McGee's failure to appeal from the board's I-A classification should not be fatal, and the exhaustion doctrine should not be applied to McGee. I would hold that he should have been classified I-O, and would set aside the conviction on Count 1.

The majority opinion had no occasion to consider the convictions on Counts 2 and 3, and did not find it necessary to deal with Count 4. However, since I would reverse the conviction on Count 1, it does seem necessary for me to consider the other counts, albeit very briefly.

Count 2 charged McGee with failing to report for his pre-induction physical examination in October 1967, after he had been reclassified I-A. It is undisputed that McGee did not report. However, he argues that had he received the I-O classification to which he was entitled, his failure to report could not constitute a crime. This contention is essentially correct. The Order to Report (SSS Form 223) which was sent to McGee by his local board quite clearly indicates to a I-O registrant that failure to report for a physical examination would not subject him to fine and imprisonment, as it would I-A and I-A-O registrants, and indeed would have no effect

at all on his obligation to perform civilian work.[1] Under those circumstances, the notice to a I-O registrant to report for a physical examination is for his benefit and is not a "duty required of him" under 50 U.S.C. App. §462 (a). See *United States* v. *Mendoza*, 295 F. Supp. 673, 683 (E.D.N.Y. 1969); *United States* v. *Walsh*, 279 F. Supp. 115, 118-19 (D. Mass. 1968). Cf. *Shoemaker* v. *United States*, 413 F.2d 274, 275 (9th Cir.), cert. denied, 396 U.S. 837 (1969). It is true that *McKart*, *supra*, 395 U.S. at 203, contains dicta suggesting that an invalid classification "would not be a defense today to a prosecution for failure to report for a pre-induction examination." However, *McKart* did not deal with the wrongful denial of a

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1 The Order to Report (SSS Form 223) states:

> To Class I-O Registrants:
>
> This examination is given for the purpose of determining whether you are qualified for military service. If you are found qualified, you will be available, in lieu of induction, to be ordered to perform civilian work contributing to the maintenance of the national health, safety or interest. If you fail to report for or to submit to this examination, you will be subject to be ordered to perform civilian work in the same manner as if you had taken the examination and had been found qualified for military service.

There is a sharp distinction in the advice the Form gives to a Class I-A and I-A-O registrant; he is told that:

> If you fail to report for examination as directed, you may be declared delinquent and ordered to report for induction into the Armed Forces. You will also be subject to fine and imprisonment under the provisions of the Universal Military Training and Service Act, as amended.

See also Local Board Memorandum No. 14, reported in S.S.L.R. 2160 (1969), which provides:

> 3. Action by Local Board Subsequent to Refusal of Its Own Registrants to Submit to Armed Forces Examination. . . .
>
> (b) If the registrant is in Class I-O, consider him for all purposes as if he had been physically and mentally examined and found acceptable for military service and process him thereafter in the same manner as any other registrant in Class I-O who has been found acceptable for service after being given an armed forces physical examination. . . .

I-O classification, and thus did not consider the option to waive a physical examination which is afforded to registrants holding such a classification. McGee should not be penalized because of the board's error, or deprived of the benefit of selective service procedures designed for conscientious objectors. Therefore, McGee's conviction on Count 2 should also be set aside.

Having thus concluded that because McGee was improperly denied classification as a conscientious objector he should have been acquitted on Counts 1 and 2 of the indictment, there remains a grave issue as to the proper treatment of his convictions on the remaining two counts. These charged that McGee knowingly failed to have in his personal possession a valid Notice of Classification (Count 3) and failed to submit information requested by his local board (Count 4). Appellant also attacks his conviction on these counts, but his arguments—particularly as to Count 3—are not very persuasive.

My problem is of a different sort. Having found error in Counts 1 and 2, I am left with the uneasy feeling that the case might have turned out differently if only Counts 3 and 4 had been involved. All of McGee's offenses grew out of the same operative fact: his policy of non-cooperation with his draft board starting in April 1967. Yet because of his earlier request, he was entitled to be classified I-O. If he had been so classified in September 1967—when he should have been—there is at least doubt that he would have become involved with the criminal law at all. It is true that he then would have been liable for civilian alternate service and presumably would have been ordered to report for it; we simply do not know whether, despite earlier contrary indications,[2] he would have obeyed such an order, which would have recognized the sincerity of

2 *Cf.* majority opinion, note 8.

his convictions. If he had, it is difficult to believe that prosecution on Counts 3 and 4 would have followed.[3] And, in any event, there is a substantial question whether the jury or the judge would have reacted differently to prosecution of a conscientious objector on Counts 3 and 4. Although the trial judge certainly acted within his authority when he sentenced McGee to concurrent two year terms, he might well have given McGee a shorter prison sentence, or even probation, had he known that McGee should have been classified as a conscientious objector and could not be convicted on Counts 1 and 2. I am aware that it is only

> on rare occasion that we have set aside a conviction on otherwise presumably "good" counts because of defects in the conviction of a defendant on "bad" counts.

United States ex rel. Weems v. *Follette*, 414 F.2d 417 (2d Cir. 1969); cf. *United States* v. *Bottone*, 365 F.2d 389, 394 (2d Cir.), cert. denied, 385 U.S. 974 (1966). This case is an appropriate instance for exercising such discretion. See *United States* v. *Barash*, 365 F.2d 395, 403 (2d Cir. 1966); *United States* v. *Hines*, 256 F.2d 561, 563 (2d Cir. 1958). Doing so would not only eliminate any doubt that McGee was prejudiced on Counts 3 and 4 by the invalid convictions on Counts 1 and 2, it would also afford the Government an opportunity to consider whether it still wishes to press the prosecution on Counts 3 and 4 against this conscientious objector and divinity student.

Accordingly, I would reverse the convictions on Counts 1 and 2 and direct a judgment of acquittal, and reverse the convictions on Counts 3 and 4 for further proceedings consistent with this dissenting opinion.

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3 Indeed, the Selective Service authorities in this case did not recommend prosecution on Count 4, even though McGee refused to obey the induction order. Gov't Exs. 39, 40.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirty-first day of March one thousand nine hundred and seventy.

Present:

HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,
HON. WILFRED FEINBERG,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

VINCENT FRANCIS MCGEE, JR.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro
Clerk

A true copy,

A. Daniel Fusaro
Clerk

By: Vincent A. Carlin
Chief Deputy Clerk

Order Denying Rehearing

33568

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

VINCENT FRANCIS McGEE, JR.,

Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

HENRY J. FRIENDLY
J. JOSEPH SMITH
WILFRED FEINBERG
U.S. Circuit Judges

I dissent—

May 7, 1970.

A true copy,

A. DANIEL FUSARO
Clerk

By: VINCENT A. CARLIN
Chief Deputy Clerk

Rehearing In Banc

33568

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

—v.—

VINCENT FRANCIS McGEE, JR.,

Defendant-Appellant

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ J. EDWARD LUMBARD
Chief Judge

May 7, 1970

A true copy,

A. DANIEL FUSARO
Clerk

By: VINCENT A. CARLIN
Chief Deputy Clerk